(90)

No. 02-241

IN THE

Supreme Court of the United States

BARBARA GRUTTER, for herself and all others similarly situated,

Petitioner,

v.

LEE BOLLINGER, JEFFREY LEHMAN, DENNIS SHIELDS, and the BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN, *et al.*,

Respondents,

and

KIMBERLY JAMES, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

A. P. CARLTON
Counsel of Record
PRESIDENT
AMERICAN BAR ASSOCIATION
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5215

Of Counsel:
Paul M. Dodyk
Rowan D. Wilson
Avram E. Luft
Katherine S. Bromberg

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The American Bar Association ("ABA") respectfully submits this brief as amicus curiae in support of the University of Michigan Law School's use of race and ethnicity as a factor in making admissions decisions.[1]

INTEREST OF THE AMICUS CURIAE

The American Bar Association, with more than 410,000 members, is the leading national membership organization of the legal profession.[2] The ABA's primary mission is to serve "the public and the profession by promoting justice, professional excellence and respect for the law."[3]

Lawyers play a central role in our system of government. Thus, for the past four decades, the ABA has worked to ensure that members of all racial and ethnic groups in the United States are represented in the legal profession. Such representation is essential to ensure that all citizens, regardless of their race or ethnicity, are able to participate meaningfully and effectively in our legal system's institutions, which are the foundation of our representative democracy.

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[1] This brief has not been authored in whole or in part by counsel for a party and no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Written consents to the filing of briefs by amici curiae have been filed in the Office of the Clerk of the Supreme Court by all parties to the proceeding.

[2] Neither this brief, nor the decision to file it, should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[3] American Bar Association, *ABA Policy and Procedures Handbook* 1 (2001).

America's law schools are the portal through which virtually all lawyers must pass. Consequently, the ability of racial and ethnic minorities to participate in our legal system depends upon whether law schools admit them in appreciable numbers. In 1968, the ABA responded to the glaring absence of African-Americans in the legal profession by creating the Council for Legal Education Opportunity (C.L.E.O) "to encourage and assist qualified persons from minority groups to enter law school and the legal profession."[4] In response to this Court's 1978 decision in *Regents of the University of California v. Bakke*, 438 U.S. 265, an ABA Task Force was convened to study the continuing under-representation of minorities in the bar and how it should be remedied. That Task Force endorsed "programs at law schools having as their purpose the admission to law school and ultimately to the legal profession of greater numbers of interested but disadvantaged members of minority groups."[5]

Since 1980, the ABA, as the primary accrediting agency for law schools, has required all law schools to demonstrate "a commitment to providing full opportunities for the study of law and entry into the profession by qualified members of groups, notably racial and ethnic minorities, which have been victims of discrimination in various forms."[6] It was not always so. Until 1943, the ABA excluded African-Americans from membership.[7] As late as 1950, a representative of the ABA

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[4] Kenneth J. Burns, Jr., *C.L.E.O.: Friend of Disadvantaged Minority Law Students*, 61 A.B.A. J. 1483, 1483 (1975).

[5] American Bar Association, *Report of the Task Force on the Bakke Decision* 659 (1978).

[6] American Bar Association, *Standards for Approval of Law Schools* 36-37, Standard 211 (2000 ed.).

[7] American Bar Association, 68 *Annual Report of the American Bar Association* 110 (1943).

testified in opposition to an attempt by African-Americans to secure admission to the all-white University of North Carolina School of Law. *See Epps v. Carmichael*, 93 F. Supp. 327, 329 (M.D.N.C. 1950). During this period, the ABA, like much of society, was complicit in the pervasive exclusion of African-Americans from the legal system.

The ABA has made great strides in overcoming its past exclusionary practices. In 1986, the ABA added to its mission Goal IX: "To Promote Full and Equal Participation in the Profession by Minorities [and] Women,"[8] and created the Commission on Racial and Ethnic Diversity in the Profession, charged with the goal of "achiev[ing] a multi-ethnic, multicultural profession conscious and appreciative of difference and blind to prejudice."[9] Following the Rodney King incident, the ABA created the Council on Racial and Ethnic Justice with the goals of aggressively promoting the recruitment and promotion of attorneys of color, establishing mentoring programs for young lawyers of color, emphasizing the hiring of people of color for clerkships and increasing the number of people of color serving on Bar Examination Committees.[10] The ABA's efforts toward diversifying the profession have benefitted the ABA. Both the President-Elect of the ABA, who becomes President in August 2003, and the President-Elect Nominee, who becomes President in August 2004, are lawyers of color, Dennis W. Archer and Robert J. Grey, Jr., respectively.

Like the ABA, this country has made great strides to remove legal and customary obstacles to the full participation

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[8] ABA Comm'n on Racial and Ethnic Diversity in the Profession, *Goal IX Report 2000-2001* 1 (2001).

[9] *Id.* at 2.

[10] American Bar Association, *Achieving Justice in a Diverse America: Summit on Racial & Ethnic Bias in the Justice System* 7 (1994).

of racial and ethnic minorities in the institutions of our justice system. Nevertheless, it has been only within the last three decades of American history that members of racial and ethnic minorities have begun to have an appreciable presence in the legal profession. This increase has been due largely to the measured and appropriate use of race-conscious admissions policies by America's leading law schools, spurred by this Court's decision in *Bakke*. Whether these fragile gains are preserved likely will depend upon the decision in this case.

SUMMARY OF THE ARGUMENT

Full participation of all racial and ethnic groups in the legal profession is a compelling state interest. *See* Point II.A., *infra*. Such participation ensures that the distinct voices of all segments of society are heard through effective representation for all people. It also creates a more inclusive legal system which better protects the rights of, and is more accessible to, the population that it governs. Furthermore, the full participation of all racial and ethnic groups in this country's legal profession preserves the legitimacy of our legal system and safeguards the integrity of our democratic government. *See* Point II.B., *infra*.

Because law schools serve as the portal to the legal profession, it is essential that they continue to be permitted to consider race and ethnicity among the myriad of other factors used to determine admissions. Pursuant to this Court's decision in *Bakke*, law schools have adopted race-conscious admissions policies which further the compelling interest of diversifying the legal profession in a manner that is consistent with the Constitution. *See* Point I., *infra*. These race-conscious admissions policies have paved the way for significant growth in the number of lawyers from under-represented racial and ethnic groups. *See* Point II.C., *infra*. Should the Court proscribe these race-conscious admissions programs, the likely result will be a precipitous decline in the number of lawyers

from under-represented racial and ethnic groups. Ironically, that decline would coincide with the rapid growth of minority populations in this country. Such a disparity may foster a perception of illegitimacy of the legal system.

States have powerful and legitimate interests in educating their citizenries to enhance the functioning of, and public support for, their own governments. *See* Point III., *infra*. This Court should give some deference to Michigan's, like other states', decision to adopt constitutionally permissible admissions policies to promote the diffusion of knowledge and to protect and enhance the operation and legitimacy of their own systems of government.

ARGUMENT

The American Bar Association respectfully submits that ensuring the full participation of racial and ethnic minorities in the institutions of the legal system of the United States is a compelling state interest, which clearly justifies the use of race-conscious admissions policies.

I. THIS COURT HAS SANCTIONED THE USE OF RACE-CONSCIOUS ADMISSIONS POLICIES BY INSTITUTIONS OF HIGHER EDUCATION SINCE 1978.

This Court sanctioned the use of race-conscious admissions policies by institutions of higher learning in 1978, when it last addressed the issue in *Bakke*. In the lead opinion, Justice Powell concluded that under the strict scrutiny test race-conscious admissions served a compelling state interest, although they must not be implemented by a rigid quota system which reserves a "fixed number of places" for persons of a particular race or ethnicity. *Bakke*, 438 U.S. at 316. Justice Powell contrasted such unlawful quotas with permissible policies in which race or ethnicity "may be deemed a 'plus' in

a particular applicant's file, [but does] not insulate the individual from comparison with all other candidates for the available seats." *Id.* at 317.[11]

In this Court's most comprehensive recent articulation of the standard for deciding the constitutionality of race-conscious policies, Justice O'Connor, speaking for the Court in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995),[12] endorsed the general approach articulated by Justice Powell, holding that all racial classifications are subject to strict scrutiny and must be justified by a compelling state interest. *Id.* at 227. Justice O'Connor went on to explain that the purpose of strict scrutiny is: "to make sure that a governmental classification based on race . . . is legitimate, before permitting unequal treatment based on race." *Id.* at 228. She concluded:

> Finally, we wish to dispel the notion that strict scrutiny is 'strict in theory, but fatal in fact.' The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country, is an unfortunate reality and government is not disqualified from acting in response to it.

Id. at 237 (citation omitted). Over the past quarter century our nation's law schools, in reliance on *Bakke*, have used race-conscious admissions policies successfully to foster the

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[11] In announcing the judgment of this Court, Justice Powell was joined by four Justices who sanctioned race-conscious admissions policies "designed to overcome substantial, chronic minority under-representation where there is reason to believe that the evil addressed is a product of past racial discrimination." *Bakke*, 438 U.S. at 366.

[12] *Adarand* involved a minority set-aside for public construction projects. Such programs are different in kind from race-conscious admissions policies that are used to ensure that racial and ethnic minorities participate in higher education and in the democratic institutions that are fundamental to our government.

inclusion of racial and ethnic minorities in their student bodies.[13]

II. ENSURING FULL MINORITY PARTICIPATION IN OUR LEGAL INSTITUTIONS IS A COMPELLING STATE INTEREST.

The compelling public interest in minority participation in the institutions of our democratic government is beyond dispute. Full participation by racial and ethnic minorities in the institutions of the legal system is especially crucial to our democracy.

A. Full Participation by Racial and Ethnic Minorities in the Legal Profession is Necessary to Ensure Adequate Representation of Minority Interests.

Ensuring that racial and ethnic minorities are members of the legal profession is a compelling state interest. American society is diverse, and growing more so each year. Full

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[13] "[A]ny departure from the doctrine of *stare decisis* demands special justification." *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984); *see also Dickerson v. United States*, 530 U.S. 428, 443 (2000); *Adarand*, 515 U.S. at 231 (1995); *Planned Parenthood v. Casey*, 505 U.S. 833, 864 (1992). To determine the existence of special justifications, the Court looks to reliance on the established rule, the workability of that rule and whether the law or the understanding of society has so changed that the rule is plainly indefensible. *See Dickerson*, 530 U.S. at 443-44; *Casey*, 505 U.S. at 854-55. No such special justifications exist here. Although race-conscious admissions programs are presently a matter of public debate, such debate only underscores the Court's responsibility to avoid creating the impression that it is withdrawing its past approval in a "surrender to political pressure." *Casey*, 505 U.S. at 867. "[T]o overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question." *Id.*

participation in the legal profession by racial and ethnic minorities is a *sine qua non* for the effective functioning of the legal system and for the legitimacy of our system of government. Twenty-four of our nation's forty-two presidents have been lawyers.[14] Twenty-three of our nation's current governors hold law degrees.[15] Lawyers have long been the single largest occupational group in the Congress. In the last session of Congress, 53 senators and 162 representatives were lawyers.[16] At the point where the legal system impinges upon and often determines the fortunes of its citizens, members of the public can speak effectively only through lawyers, and their fate is often determined by the judiciary.

Effective representation of our nation's minorities depends upon their full participation in all of the institutions that comprise our legal system. This is not to say that a person's interests are determined by his or her race or ethnicity. Rather, it means that the interests of minority groups cannot be adequately considered or represented without their participation in meaningful numbers in our legal system.[17] Lawyers, judges

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[14] *Presidential Occupations at* http://members.aol.com/_ht_a/DOWNINDAPARISH2/president.htm (last visited Feb. 6, 2003).

[15] National Governors Association, *Fast Facts on Governors, at* http://www.nga.org/governors/1,1169,C_TRIVIA^D__2163,00.html (last visited Feb. 6, 2003).

[16] Mildred L. Amer, The Library of Congress, *Membership of the 107th Congress: A Profile* 3 (2001).

[17] *See Peters v. Kiff*, 407 U.S. 493, 503-04 (1972) (plurality opinion) ("[W]e are unwilling to make the assumption that the exclusion of Negroes has relevance only for issues involving race. When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case . . . .").

and public officials who share a common membership in a minority group typically share a body of experience that is not shared or fully understood by those who are not members of that minority group.[18] It is only through the articulation of these diverse experiences and the ensuing give-and-take within the institutions which comprise our legal system and our democracy that racial and ethnic minority interests can be adequately protected and represented.

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[18] At a time when they numbered fewer than 1,500 throughout the country, it was primarily African-American lawyers who persevered in the decades long litigation required to bring an end to the reign of Jim Crow. Jack Greenberg, the former Director-Counsel of the NAACP Legal Defense Fund, describes how in 1961, he established "lawyer training institutes" for African-American lawyers, because "[a]lmost no southern white lawyers would then handle civil rights cases." Jack Greenberg, *In Memoriam -- Marvin E. Frankel*, 102 Colum. L. Rev. 1743, 1744 (2002). Fred D. Gray, an African-American attorney for the plaintiffs in *Browder v. Gayle*, 142 F. Supp. 707 (D.C. Ala. 1956), *aff'd*, 352 U.S. 903 (1956), and the current President of the Alabama State Bar, described how his experience riding segregated buses in Montgomery, Alabama, directly led to his decision to study law and his commitment to the litigation which ended segregated busing. He states: "I made a secret pledge that I would become a lawyer, return to Alabama, pass the bar exam, and destroy everything segregated I could find." Fred D. Gray, *Civil Rights -- Past, Present and Future, Part II*, 64 Ala. Law. 8, 8 (2003). Similarly, Eric Yamamoto describes how he and other Japanese-American lawyers reopened the Japanese internment case of *Korematsu v. United States*, 323 U.S. 214 (1944), despite the advice of former Supreme Court Justice Goldberg to "forget it, you haven't a chance." Eric K. Yamamoto, *The Color Fault Lines: Asian American Justice from 2000*, 8 Asian L.J. 153, 154 (2001).

Members of racial and ethnic minorities bring to the bench and bar the unique perspectives that are necessary for effective representation of minority interests. As Justice O'Connor said of former Justice Thurgood Marshall:

> Although all of us come to the court with our own personal histories and experiences, Justice Marshall brought a special perspective . . . . Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the persuasiveness of legal argument but also to the power of moral truth.

Hon. Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 Stan. L. Rev. 1217 (1992). Likewise, Judge Leon Higginbotham, Jr. has recognized the importance of judicial diversity, noting that it "creates a milieu in which the entire judicial system benefits from multi-faceted experiences with individuals who came from different backgrounds."[19]

The Census Bureau has recently reported that 86.9 million, or 30.9%, of our nation's population of 281.4 million are members of minority groups[20] and that during the last two decades the minority population expanded at eleven times the rate of increase of the majority white population.[21] Under these circumstances, a legal system that does not reflect and seek the

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[19] A. Leon Higginbotham, Jr., *Seeking Pluralism in Judicial Systems: The American Experience and the South African Challenge*, 42 Duke L.J. 1028, 1037 (1993).

[20] U.S. Census Bureau, U.S. Dep't of Commerce, *U.S. Summary: 2000* 2, tbl. DP-1 (July 2002) *available at* http://www.census.gov/prod/2002pubs/c2kprof00-us.pdf.

[21] U.S. Census Bureau, U.S. Dep't of Commerce, *Demographic Trends in the 20th Century* 80 (Nov. 2002) (measuring growth of population in last twenty years).

full participation of America's diverse racial and ethnic minorities works against itself. Yet, for most of our nation's history that was the state of affairs.[22]

The virtual absence of African-Americans from America's law schools was not a matter of happenstance.[23] To the contrary, it reflected the official policy for most of our history; African-Americans, until recently the largest racial minority, were excluded as a matter of law from attending law schools of the states in which a majority of them resided. The march of litigation which led to this Court's landmark decisions in *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Bakke*, began in our nation's law schools. Since *Missouri ex. rel.*

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[22] The Civil Rights movement highlighted the inherent deficiency of an exclusionary white justice system which failed in its basic mission to protect minorities from racial assaults or to punish their perpetrators. *See, e.g.*, Donna Britt, *One Women's Unending Pain, Another's Silence*, Wash. Post, Jan. 10, 2003, at B01; Rick Bragg, *38 Years Later, Last of Suspects is Convicted in Church Bombing*, N.Y. Times, May 23, 2002, at A1; Claudia Dreifus, *The Widow Gets Her Verdict*, N.Y. Times, Nov. 27, 1994, §6 (Magazine), at 69.

[23] In 1950, there were approximately 1450 African-American lawyers in the United States, out of a total of 221,605 lawyers, servicing a population of 150.7 million, 10% of whom were African-Americans. *See* William C. Kidder, *The Struggle for Access from Sweatt to Grutter: A History of African American, Latino, and American Indian Law School Admission, 1950-2000*, 19 Harv. Black Letter L.J. (forthcoming spring 2003) (manuscript at 5); Campbell Gibson & Kay Jung, U.S. Dep't of Commerce, *Historical Census Statistics on Population Totals by Race, 1790-1990, and by Hispanic Origin, 1970 to 1990, for the United States, Regions, Divisions and States* Table 1 (2002) *available at* http://www.census.gov/population/www/documentation/twps0056.html (last visited Feb. 10, 2003). In 1960, there were 2,180 African-American lawyers. As recently as 1970, there were only 3,845. Kidder, *supra* (manuscript at 6).

Gaines v. Canada, 305 U.S. 337 (1938), this Court has recognized the importance of the public interest in enabling racial minorities to participate effectively in our legal system. In *Missouri ex. rel. Gaines*, this Court held that the Equal Protection Clause required the State of Missouri to provide a legal education to plaintiff Gaines, an African-American, at the Missouri State Law School because such an education was necessary to enable Mr. Gaines to function effectively as a member of the Missouri bar. *See id.*; *see also Sweatt v. Painter*, 339 U.S. 629 (1950);[24] *McLaurin v. Oklahoma State Regents for Higher Educ.*, 339 U.S. 637 (1950). Despite these decisions, as many as one-third of southern state law schools continued to exclude African-Americans in 1956.[25] As late as the early 1960s, there were no African-American law students enrolled at the University of Michigan or the University of California at Berkeley or Los Angeles.[26]

The ABA submits that it is crucial that a client have the ability to choose a lawyer with whom she feels comfortable. This is even more important for racial minorities in light of this country's history of discrimination and racial exclusion. Many marginalized members of society understandably put their trust more readily in lawyers who possess a shared background or heritage.[27] It is not simply that the availability of such lawyers

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[24] In *Sweatt*, the Court rejected as inadequate an all-black law school recently established by the State of Texas, finding that a "law school . . . cannot be effective in isolation from the individuals and institutions with which the law interacts." 339 U.S. at 634.

[25] Maurice T. Van Hecke, *Racial Desegregation in the Law Schools*, 9 J. Legal Educ. 283, 285 (1956).

[26] *See* Kidder, *supra* note 23 (manuscript at 8).

[27] Social science studies demonstrate that an individual's race affects trust, self-disclosure, and expectations in a relationship where the care-giver is white and the patient or client is African-American. Michelle S. Jacobs, *People from the Footnotes: The Missing Element in Client-Centered Counseling*, 27 Golden Gate U. L. Rev. 345, 384-91 (1997). Similar studies with Latino, Native-American and Asian-American subjects show similar results. *Id.* at 390. *See also* Kiyoko Kamio Knapp, *Disdain of Alien Lawyers: History of Exclusion*, 7 Seton Hall Const. L.J. 103, 131 (1996) ("Newly-arrived immigrants, faced with cultural and linguistic barriers, may find it especially helpful to retain an advocate who shares their ethnic heritage and has the ability to bridge the culture gap.").

affects the quality of representation that minority clients receive; it may determine whether that person seeks legal assistance at all. "Effective access to legal representation not only must exist in fact, it must also be perceived by the minority law consumer as existent so that recourse to law for the redress of grievance and the settlement of disputes becomes a realistic alternative to him."[28]

B. Full Participation by Racial and Ethnic Minorities in the Legal Profession is Necessary to Ensure the Legitimacy of Our Democracy.

Without effective participation by all segments of society, the legitimacy of our legal system will be imperiled. Our nation's founders recognized that a legitimate government depends upon the participation of all the people. "It is *essential* to [a republican] government that it be derived from the great body of society, not from . . . a favored class of it . . . ."[29]

In particular, the ability of the judiciary to discharge its constitutional responsibilities "ultimately rests" on "public confidence in it." *United States v. Johnson*, 323 U.S. 273, 276 (1944); *see also Mistretta v. United States*, 488 U.S. 361, 407

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[28] Erwin N. Griswold, *Some Observations on the DeFunis Case*, 75 Colum. L. Rev. 512, 517 (1975).

[29] *The Federalist* No. 39, at 251 (James Madison) (Jacob E. Cooke ed., 1961) (1788).

(1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship."). Courts must guard against perceptions that "destroy[] the appearance of justice and thereby cast[] doubt on the integrity of the judicial process." *Rose v. Mitchell*, 443 U.S. 545, 555-56 (1979).

In its decisions prohibiting the exclusion of minorities from jury service, this Court expressly has recognized the importance of racial inclusiveness to the perceived fairness of the legal system.[30] In these cases, the Court has repeatedly held that the perceived fairness of the judicial system rests upon its racial inclusiveness:

> [B]e it at the hands of the State or the defense, if a court allows jurors to be excluded because of group bias, [i]t is [a] willing participant in a scheme that could only undermine the very foundation of our system of justice -- our citizens' confidence in it.

Georgia v. McCollum, 505 U.S. 42, 49-50 (1992) (internal quotations and citations omitted). Similarly, the Court has found in legislative redistricting cases that there is a compelling interest in the legitimacy and functioning of the government. *See Easley v. Cromartie*, 532 U.S. 234 (2001).

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[30] These cases rest upon two principles of great importance to this case. The first concerns the harm minorities suffer when they are excluded from the "machinery of justice." *Powers v. Ohio*, 499 U.S. 400, 406, 410 (1991) (discussing "stigma or dishonor" of inability to participate in justice system). The second is that public confidence in the courts depends upon avoiding the perception of unfairness that results from lack of participation. In *Powers*, the Court concluded that discrimination in jury selection undermines public confidence in the administration of justice and "invites cynicism" regarding the impartiality of the system. *Id.* at 412; *see also Batson v. Kentucky*, 476 U.S. 79, 87 (1986) ("The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community.").

Unfortunately, many minorities perceive the justice system as exclusionary and unfair; for much of our history, that has been true. As Alexis de Tocqueville observed many years ago:

> [O]ppressed [African-Americans] may bring an action at law, but they will find none but whites among their judges and although they may legally serve as jurors, prejudice repels them from that office.[31]

The perception of legal oppression and the reality that caused it has endured through the years. As W.E.B. Du Bois observed at the beginning of the twentieth century, "[t]he Negro is coming more and more to look upon law and justice, not as protecting safeguards, but as sources of humiliation and oppression."[32] Half a century later, Gunnar Myrdal observed such distrust to be a continuing reality:

> The Negroes, on their side, are hurt in their trust that the law is impartial, that the court and the police are their protection, and, indeed, that they belong to an orderly society which has set up this machinery for common security and welfare. They will not feel confidence in, and loyalty toward, a legal order which is entirely out of their control and which they sense to be inequitable and merely part of the system of caste suppression.[33]

The consequence of this unfortunate history is that many people today still question whether our legal system can deliver justice to racial and ethnic minorities.[34] The State of Michigan,

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[31] 1 Alexis de Tocqueville, *Democracy in America* 359 (Vintage Books 1990) (1835).

[32] W.E.B. Du Bois, *The Souls of Black Folk* 123 (Bantam 1989) (1903).

[33] Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* 525 (Transaction Publishers 2000) (1944).

[34] Recent history has continued to provide examples of troubling court results that shake the confidence of racial and ethnic minorities in our justice

where this case arose, has confronted that troubling fact. In 1987, the Michigan Supreme Court appointed a task force to study racial, gender and ethnic bias, motivated by the belief of "a disturbing percentage of citizens . . . that bias exists in the Michigan Court system."[35] Other state courts and federal circuits have reached similar conclusions and made similar recommendations.[36]

The *Michigan Report* authored by the Task Force emphasized that "[n]o segment of society is so strategically positioned to attack minority problems as the legal profession."[37] The Task Force examined the representation of

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system. *See, e.g.*, Bob Herbert, *The Latest From Tulia*, N.Y. Times, Dec. 26, 2002, at A39; Bob Herbert, *Kafka in Tulia*, N.Y. Times, July 29, 2002, at A19; *Cincinnati Officer is Acquitted in Killing That Ignited Unrest*, N.Y. Times, Sept. 27, 2001, at A14; Kevin Sack, *Despite Report After Report, Unrest Endures in Cincinnati*, N.Y. Times, Apr. 16, 2001, at A1; *Slayer is Acquitted of Civil Rights Violation*, N.Y. Times, May 2, 1987, at A28; Judith Cummings, *Detroit Asian-Americans Protest Lenient Penalties for Murder*, N.Y. Times, Apr. 26, 1983, at A16.

[35] Michigan Supreme Court Task Force on Racial/Ethnic Issues in the Courts, *Final Report* 2 (1989) (hereinafter *Michigan Report*).

[36] *See, e.g.*, The Racial Fairness Implementation Task Force of the Supreme Court of Ohio, *Progress Report* 4 (2001); Kathy Schiflett, Kentucky Court of Justice, *Kentucky's Court of Justice Racial/ Ethnic Fairness Task Force and Comm'n Initiatives* 2 (2001); Tennessee Supreme Court Comm. to Implement the Recommendations of the Racial and Ethnic Fairness Comm'n and Gender Fairness Comm'n, *2001 Annual Report* (2001); Oregon Supreme Court, *Report of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System*, 73 Or. L. Rev. 823, 843, 917 (1994); New York State Judicial Comm'n on Minorities, *Report of the New York State Judicial Comm'n on Minorities*, 19 Fordham Urb. L.J. 181 (1992).

[37] *See Michigan Report*, *supra* note 35, at 1.

minorities in the institutions which comprised the Michigan legal system and found that the "absence of representative numbers of minorities in these [legal] positions affects the confidence in and effectiveness of the system."[38] The Task Force found that "[m]inority presence is inadequate . . . on the benches of the State."[39] The Task Force concluded:

> [t]he inclusion and success of minority attorneys in every facet of the legal profession is essential to the appearance of fairness in the administration of justice, and is an indication of the treatment that other minority participants may expect to receive from that same system.[40]

A recent public opinion survey confirmed generally the findings of the Michigan Task Force. The survey found that 68% of African-Americans said that African-Americans were treated worse in the court system than whites; 43% of whites and 42% of Hispanics agreed.[41] Even within the bar, one survey found that 92% of African-American lawyers believe the justice system is as racially biased as other segments of society[42] and less than 18% of African-American federal judges believe that the justice system treats African-Americans fairly.[43]

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[38] *Id.* at 67.

[39] *Id.*

[40] *Id.* at 57.

[41] David B. Rottman & Alan J. Tomkins, *Public Trust and Confidence in the Courts: What Public Opinion Surveys Mean to Judges*, Court Review, Fall 1999, at 24, 26.

[42] Terry Carter, *Divided Justice*, 85 A.B.A. J. 42, 43 (Feb. 1999).

[43] Kevin L. Lyles, *The Gatekeepers: Federal District Courts in the Political Process* 237 (1997).

C. Race-Conscious Admissions Are Essential to Increasing Minority Representation in the Legal System.

In 1965, barely one percent of law students in America were African-American.[44] It was at this time that Dean Erwin Griswold launched an effort to increase African-American access to Harvard Law School, including the use of race-conscious admissions criteria.[45] This strategy subsequently was adopted by other law schools and African-American and other minority enrollment at America's law schools began to rise in the late 1960s.

By 1971, 4.8% of the law student population was African-American and 1.48% was Hispanic.[46] Between 1980 and 2000, the impact of race-conscious admissions standards was felt by the legal profession. African-American participation in the legal profession increased from 2.7% to 5.7%, while Hispanic participation increased from 1% to 4.1%.[47] The trend of increasing African-American participation in our nation's law schools halted in 1998 when 2,943 degrees were awarded and has fallen in the years since.[48] At the same time, the number of

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[44] William G. Bowen & Derek Bok, *The Shape of the River* 5 (1998).

[45] *Id.*

[46] American Bar Association, *Minority Enrollment 1971-2001*, *at* http://www.abanet.org/legaled/statistics/ministats.html (last visited Feb. 10, 2003) (data cited reflects 1971 school year); American Bar Association, *Legal Education and Bar Admission Statistics, 1963-2001*, *at* http://www.abanet.org/legaled/statistics/le_bastats.html (last visited Feb. 7, 2003) (data reflects 1971 school year).

[47] U.S. Census Bureau, U.S. Dep't of Commerce, *Statistical Abstract of the United States: 2001* 380 (2001).

[48] American Bar Association, *Minority Degrees Awarded (by ethnic group) 1980-2001*, *at* http://www.abanet.org/legaled/statistics/mindegrees.html (last visited Feb. 10, 2003).

African-American and Hispanic citizens has risen to nearly 25% of the 281.4 million people living in the United States.[49]

While the nation's law schools have made great strides in increasing minority participation in the legal profession since 1970, minorities are still not full participants in the legal profession.[50] But it is unquestionable that the improvement in minority participation in our law schools, and thus in our legal system, has been achieved largely by the use of race-conscious admissions policies such as those under attack here.

During the late 1990s, as demand for legal education rose, interested parties sought judicial and legislative intervention to prohibit the use of race-conscious admissions policies. They succeeded in Texas with the Fifth Circuit's decision in *Hopwood v. Texas*, 78 F.3d 932 (5th. Cir. 1996), and in California with Proposition 209.[51] In the wake of those developments, the law schools of Texas and California were forced to abandon their race-conscious admissions policies. The results were dramatic.

At the University of California Law School at Berkeley, African-American enrollment fell from more than twenty-three students per class in the four years preceding Proposition 209

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[49] U.S. Census Bureau, U.S. Dep't of Commerce, *Census 2000 Summary File 1*, *at* http://www.census.gov/population/cen2000/phc-t9/tab01.pdf (released Feb. 25, 2002).

[50] In most cities, less than three percent of law partners are minorities, who are often "partners without power", clustered at the bottom of firm management and compensation structures; only 2-8 percent of general counsel in the Fortune 500 companies are minorities. Elizabeth Chambliss, American Bar Association, *Miles to Go 2000: Progress of Minorities in the Legal Profession* vi (2000).

[51] Cal. Const. art. I, § 31, cl. a (amended 1996).

to fewer than eight students per class, accounting for about 2% of the Law School's average enrollment, in the four years following.[52] At the University of Texas Law School, African-American enrollment fell from somewhat over thirty-three students per class in the four years preceding *Hopwood* to fewer than eleven students per class, again accounting for somewhat less than 2% of the law school's average enrollment, in the four years following.[53]

The ABA respectfully submits that the reduction in minority enrollment that would result from an abandonment of the policies embraced by *Bakke*, as evidenced by recent experience in Texas and California, would undo much of what has been accomplished in the last several decades. A precipitous decline in minority participation in the institutions of our legal system, particularly while minority populations are rapidly increasing,[54] would damage access by minorities to our legal system, undermine the effectiveness of minority representation and erode the legitimacy of the legal system, which rests upon public perception of inclusivity and fairness.

For that reason, the ABA, as part of its accreditation process, requires law schools to demonstrate a "commitment to providing full opportunities for the study of law and entry into the profession by qualified members of groups, notably ethnic and racial minorities, which have been victims of discrimination in various forms."[55] The ABA's commitment, and the similar commitment by law schools, to consider race as one of many factors affecting admissions decisions rests on its firmly-held "belief that diversity in the student body and the

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[52] Kidder, *supra* note 23 (manuscript at 31-32).

[53] *Id.*

[54] *See supra* text accompanying notes 20-21.

[55] American Bar Association, *Standards for Approval of Law Schools*, Standard 211 (2000 ed.).

legal profession is important both to a meaningful legal education and to meet the needs of a pluralistic society and profession."[56]

III. PUBLIC LAW SCHOOLS HAVE A COMPELLING INTEREST IN ENSURING THAT RACIAL AND ETHNIC MINORITIES RECEIVE A LEGAL EDUCATION.

The constitutions of our nation's fifty states recognize the fundamental importance of education to our republican form of government and impose a duty upon the states to provide public education for their citizens and to ensure that such education is extended to all segments of society. Many of our state constitutions explicitly recognize that universal public education is necessary because "[a] general diffusion of knowledge and intelligence [is] essential to the preservation of the rights and liberties of the people . . . ." Cal. Const. art IX, § 1. To the same effect, *see* Ind. Const. art. VIII, § 1; Me. Const. art. VIII, § 1; Mass. Const. pt. 2, C. 5, § 2; Mo. Const. art. IX, § 1(a); N.H. Const. pt. 2 art. 83; R. I. Const. art. XII, § 1; Tex. Const. art. VII, § 1.

Other constitutions proclaim that because "[t]he stability of a republican form of government depend[s] mainly upon the intelligence of the people, it is the duty of the legislature to establish a general and uniform system of public schools." Minn. Const. art. XIII, § 1; *see also* Idaho Const. art. IX, § 1; S.D. Const. art. VIII, § 1; N.D. Const. art. VIII, § 1. The Michigan Constitution provides that "knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Mich. Const. art. VIII, § 1.

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[56] Lawrence Newman, ABA Section of Legal Education and Admissions to the Bar, *Recommendation on Standard 212* 3 (1980).

The diffusion of knowledge is the goal of public education generally. George Washington, an ardent supporter of a national university to educate citizens from all parts of the country and from all backgrounds, said:

> Knowledge is in every country the surest basis of public happiness. . . . To the security of a free Constitution it contributes in various ways: by convincing those who are entrusted with the public adminstration, that every valuable end of Government is best answered by the enlightened confidence of the people and by teaching the people themselves to know, and to value their own rights; to discern and provide against invasions of them; to distinguish between oppression and the necessary exercise of lawful authority.[57]

Benjamin Rush, another eighteenth century proponent of public education, said of the importance of the diffusion of knowledge, "where knowledge is confined to a few people, we always find monarchy, aristocracy, and slavery."[58]

The diffusion of knowledge through state institutions of higher education must extend to all racial and ethnic groups to help ensure our democracy. Among the many subjects of public education, knowledge of law is of primary importance. Legal education perpetuates the rule of law, upon which the very legitimacy of all governmental decisions depends. Accordingly, when a state such as Michigan seeks to ensure that public legal education is not confined to a few people, it is acting in furtherance of a compelling interest.

In *Bakke*, Justice Powell observed that:

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[57] George Washington, Address to Both Houses of Congress (Jan. 8, 1970), *in* Annals of Cong. 970 (Gales & Seaton ed., 1790).

[58] Benjamin Rush, *A Plan for the Establishment of Public Schools and the Diffusion of Knowledge in Pennsylvania* (1786), *reprinted in Essays on Education in the Early Republic* 2 (Frederick Rudolph ed., 1965).

> [a]cademic freedom . . . long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body.

438 U.S. at 312. Justice Powell recognized that the University of California had a "countervailing constitutional interest" in deciding its admissions policies, that its race-conscious admissions policy was a matter of "paramount importance in the fulfillment of its mission," and that a university must have wide discretion in making the sensitive judgments as to whom should be admitted, so long as those judgments did not result in awarding a "fixed number of places" on the basis of race. *Bakke*, 438 U.S. at 313, 316.

The use of race-conscious admissions policies by public law schools such as the University of Michigan, implemented pursuant to this Court's decision in *Bakke*, represents a reasonable effort on the part of the law schools to respond to the under-representation of minorities in our legal system. Until recently, such under-representation was the result of deliberate government policies intended to deny racial and ethnic minorities their democratic right to participate in our government.

The call now for color-blind admissions policies for public institutions of higher education seeks to shift to racial and ethnic minorities the full burden of our long history of slavery, racial segregation and other official policies intended to exclude racial and ethnic minorities. As Justice Marshall observed in *Bakke*:

> Most importantly, had the Court been willing in 1896 in *Plessy v. Ferguson*, to hold that the Equal Protection Clause forbids the differences in treatment based on race, we would not be faced with this dilemma in 1978. We must remember, however, that the principle that the "Constitution is color blind" appeared only in the opinion of the lone dissenter. The majority of the Court rejected

> the principle of color blindness, and for the next 60 years, from *Plessy* to *Brown v. Board of Education*, ours was a nation where, *by law*, an individual could be given 'special treatment' based on the color of his skin.

438 U.S. at 401 (citation omitted). Since *Brown v. Board of Education*, this Court has made great strides in undoing the legacy of *Plessy*, often by sanctioning narrowly directed race-conscious actions. This has not been done to exclude, but rather to include those previously left out.

The goal of the University of Michigan Law School's race-conscious admissions policy -- the education of both majority and minority students to ensure their effective participation in the institutions of government -- is fundamental and compelling; and the law school's good faith efforts to reach this goal is entitled to some measure of deference. Only if law schools are permitted some reasonable latitude to consider race and ethnicity in their admissions decisions will they be able to accomplish one of the fundamental goals of a democratic government, the diffusion of knowledge through a racially and ethnically diverse student body.

CONCLUSION

For the reasons set forth herein, the American Bar Association respectfully urges this Court to affirm the Sixth Circuit ruling that the University of Michigan Law School's admissions policy is constitutional.

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Respecfully submitted,

A. P. CARLTON
Counsel of Record
PRESIDENT
AMERICAN BAR ASSOCIATION
750 North Lake Shore Drive
Chicago, Illinois 60611
(312) 988-5215

Of Counsel:
Paul M. Dodyk
Rowan D. Wilson
Avram E. Luft
Katherine S. Bromberg